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No. 09-222

Supreme Court, U.S.
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In The

Supreme Court of the United States

BECKY MATHENY, JOHNNA LAWRENCE, AND THOMAS LAWRENCE,

Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

TVA's Brief in Opposition does not challenge petitioners' description of the relevant facts in *any* respect. In particular, TVA does not dispute that it exercised complete dominion and control over the narrow confines of the Cumberland Steam Plant harbor, and directly supervised the tugboat and barge operations in that harbor. Nor, for that matter, does TVA challenge the absurdity of the Limitation Act's application in this case or the injustice of the result that it yielded in the Sixth Circuit.

TVA's position, in substance, is to say that its status as the owner of the Patricia H shields it from liability for the "navigational error" of the tugboat's master, regardless of any other facts and circumstances, including TVA's complete control of the confined waterway and its hands-on supervision of the tugboat operations. In TVA's view, "navigational error" is a talisman.

This result does not follow from either the language or purpose of the Limitation Act, nor can TVA put forward any precedent for limiting a ship owner's liability under remotely similar circumstances. It is a remarkably shameless position for the government to take, far removed from the maxim inscribed on the walls of the Justice Department

itself that "[t]he United States wins its point whenever justice is done its citizens in its courts."[1]

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHAT IS A SPLIT OF AUTHORITY IN THE CIRCUITS (CONTRARY TO THE GOVERNMENT'S ASSERTION) AND ESTABLISH A UNIFORM INTERPRETATION OF THE LIMITATION OF LIABILITY ACT THAT RECOGNIZES THE ROLE OF A SHIP OWNER'S CONTROL.

Simply put, petitioners contend that the Limitation Act does not insulate TVA here because of the control it actually exercised over the confined waterway where Ronald Matheny drowned and Thomas Lawrence was injured, regardless of Captain Ralls's clean safety record up to the point of that tragedy. The Fifth and Eighth Circuits have held that the owner's *control* can trump the limitation that a master's history of competence generally affords in so-called "navigational error" cases. *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1377 n.15 (5th Cir. 1983) (en banc); *In re MO Barge Lines, Inc.*, 360 F.3d 885, 891 n.5 (8th Cir. 2004). While the Sixth Circuit's decision gives rise to a manifest split in the circuits on this point, it is also notable that TVA has been unable to adduce a single decision from any

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[1] Quoted in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The different context is of no import; the principle applies, or should apply, equally as well here, if not more so.

other circuit that even *sub silento* supports TVA's position by sustaining limitation on facts reflecting a comparable measure of ownership control and supervision of vessel operation.

Defying credulity, TVA denies that the Fifth and Eighth Circuits have recognized any such limitation on limitation. Opp. 7-8. Writing for the unanimous en banc court in *Continental Oil*, however, Judge Rubin explicitly observed that the Fifth Circuit was breaking new ground by denying limitation of liability "for a master's navigational errors at sea when the owner ha[d] exercised reasonable care in selecting the master." *Continental Oil*, 706 F.2d at 1377 n.15.[2] The basis for this departure from the general rule lay precisely in the control that the owner exercised in the form of the ship captain's extraordinary authority to act on its behalf in matters well beyond a master's usual scope of authority. The court's ruling turned on that very point. *Id.* at 1376-77.

On the unusual facts of *Continental Oil*, the owner maintained its presence at sea, and thus its control of the vessel's operations, by bestowing this

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[2] The same quotation, though at greater length, inexplicably appears in a parenthetical at page 8 of TVA's Opposition after the same citation to *Continental Oil*: "recognizing that 'no court has previously denied a corporate shipowner limitation of liability for a master's navigational errors at sea when the owner has exercised reasonable care in selecting the master.'" Ironically, the fuller quotation makes it even more explicit that the Fifth Circuit knew it was making new law.

expanded authority upon the master. The owner's control under such circumstances rendered nugatory the reasonable care it had indisputably exercised in selecting and retaining the vessel's captain. *See id.*

Here, the owner's control was even more immediate; no imputation of authority is necessary. TVA supervisors were on the scene at all times, directly supervising the tugboat operations, as both Captain Ralls and his supervisor (David Duke) testified. In fact, TVA does not even dispute its control and close supervision of the tugboats as a matter of fact; it simply denies, in substance, that the fact of control has any legal significance, but the Fifth Circuit has ruled otherwise.

The Eighth Circuit more recently recognized the same principle in *In re MO Barge Lines, Inc., supra,* 360 F.3d at 891 n.5 (citing *Continental Oil, supra,* 706 F.2d at 1377). However, the owner's control was evidently not an issue in that case (and thus not a basis for denying limitation), which arose from a collision on the Mississippi River.

In summary, the Sixth Circuit apparently stands alone in holding, in effect, that a ship owner is always insulated from liability for a master's negligence so long as the owner has not been negligent in its hiring or retention of the master up to the point of an accident. This is an extreme interpretation of the Limitation Act, but it sets a dangerous precedent unsupported by the statute's text or purpose, and serving no conceivable public policy interest. In fact,

it plainly constitutes bad public policy, serving only to prevent otherwise deserving plaintiffs from being made whole.

II. THE COURT SHOULD ALSO GRANT REVIEW BECAUSE THE SIXTH CIRCUIT HAS SET A FUNDAMENTALLY FLAWED BUT POTENTIALLY IMPORTANT AND FAR-REACHING PRECEDENT FOR THE PROPOSITION THAT A GOVERNMENTAL OR CORPORATE SHIP OWNER WITH AN UNDENIABLE DUTY TO SUPERVISE VESSEL OPERATIONS IN CONFINED WATERS IS NEVERTHELESS INSULATED FROM ANY LIABILITY FOR BREACHING THAT DUTY BY THE LIMITATION ACT.

The district court also held that, on the facts of the case, TVA had a duty to supervise Captain Ralls and its other tugboat captains, a duty that it had negligently breached. TVA can hardly dispute (and does not dispute) that it had a duty to supervise when it was, in fact, closely supervising and even directing the tugboat operations. Nor does TVA even dispute its negligent discharge of that duty insofar as it resulted in Mr. Matheny's death and the Lawrences' injuries.

Instead, TVA has successfully asserted, at least to this point, that the Limitation Act insulates it from liability even as a supervisor. In doing so, TVA turns this Court's decision in *American Car & Foundry Co. v. Brassert*, 289 U.S. 261 (1933), on its head. The brand-new recreational craft at issue in *American*

Car blew up on Lake Michigan, injuring its purchaser, with the vessel itself rendered a total wreck. *Id.* at 262. By happenstance, the manufacturer had retained title to the vessel solely for the purpose of securing the purchase price, *see id.* at 264, so American Car seized upon that fact to limit its potential liability for negligence in the vessel's manufacture by preemptively filing a libel seeking limitation of liability under the Act. *See id.* at 262, 265.

Writing for this Court, Chief Justice Hughes ruled that the Limitation Act was inapplicable, because the potential liability was not based on the petitioner's technical status as the owner, but on its role as manufacturer and vendor. The ship's owner could not insulate itself from "actionable neglect" in the manufacture of the vessel just because it had retained the status of title holder; liability for the vessel's negligent manufacture was "not a liability falling within the policy and purview of the [Limitation] Act. . . ." *Id.* at 265-66.

The same principle applies here. TVA's coincidental ownership of the Patricia H is irrelevant to the analysis. Owner or not, it had a duty to supervise the tugboat operations and, in fact, was doing so. It breached that duty in this particular instance, as the district court found as a matter of fact. TVA's liability in this instance is based on its failures as a *supervisor*, just as American Car's potential liability was based on its failures as a manufacturer; the same liability would attach regardless of who owned the

tugboat, a liability not within the purview of the Limitation Act.

The Sixth Circuit has created a dangerous precedent that allows a government or corporate entity exercising complete control over a waterway to limit its liability so long as it happens to also hold the title to the vessel that caused an accident. In effect, and without regard to whether the entity has taken on the duty to supervise, the Sixth Circuit has held that an entity in that position has *no* duty to supervise, because it cannot be enforced (which is the same thing as having no duty at all). The unsoundness of the Sixth Circuit's view is demonstrated by the fact that under its analysis, it would necessarily follow that TVA's liability would not be limited if TVA had happened to lease the Patricia H instead of owning it. The government's otherwise applicable obligation to make plaintiffs whole under such circumstances should not turn on such irrelevancies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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